

NTSB Order No.
EM-60

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 12th day of May 1977

OWEN W. SILER, Commandant, United States Coast Guard,

v.

EARL LOUIS NELSON, Appellant.

Docket ME-56

ORDER ON RECONSIDERATION

Petitioner seeks reconsideration of Board Order No. EM-54, adopted October 26, 1976, dismissing his appeal from a decision of the Commandant. In prior proceedings, petitioner had a hearing before an administrative law judge and appealed from the latter's initial decision to the Commandant. (Appeal No. 2052).¹ The Commandant sustained findings that petitioner's navigational failures in piloting the M/V GEORGE PRINCE on February 4, 1974, contributed to the vessel's collision with a barge under tow in the Mississippi River. A 3-month suspension of petitioner's pilot license No. 448865 was ordered by the law judge and affirmed by the Commandant.

The record discloses that the GEORGE PRINCE is a vessel of the State of Louisiana highway department which was providing ferry service between Luling and Destrehan, Louisiana. These communities are situated on opposite banks of the river within the state. The Coast Guard acknowledged that the vessel was not subject to federal inspection and manning requirements. However, it was stipulated that petitioner was serving aboard the ferry under authority of his Coast Guard license, which the state required. (Tr. 48).

Petitioner now makes the contrary assertion that he was acting under a state commission rather than his license, and contends that the Coast Guard thus had no jurisdiction to suspend the federal license. Upon this ground, not raised previously, he moves to dismiss the case and expunge the record herein. Counsel for the

¹Copies of the decisions of the Commandant and the law judge are attached.

Commandant has filed an answer opposing the motions.

In Dietz v. Siler,² upon which petitioner relies, and Soriano v. United States,³ federal courts have set aside the suspension of pilot licenses for negligence or misconduct in performing pilotage regulated by the states. Both cases involved the piloting of foreign merchant vessels on waters connecting the state's ports with the high seas. In movements of this kind, it is well settled that vessels engaged in foreign trade, including any registered vessel of the United States, whether proceeding inbound or outbound, must take on board a duly authorized state pilot.⁴ Since the conduct giving rise to the federal suspension actions took place when the pilots were functioning under state law, the sanctions were disallowed even though, as in Soriano, the federal license was a prerequisite under state law to the state's authorization of the pilot.

The reasoning of the judicial precedents would not perforce oust the Coast Guard's jurisdiction in this case. Whereas the State of Louisiana clearly regulates the form of pilotage considered in Dietz,⁵ petitioner does not cite any similar provision of state law, and we have found none, concerning its ferry pilots. There has been no proof either that he possessed a state commission or, if he did, that his piloting of the state's ferry was authorized in the commission. Finally, it appears that the only reason for exempting the GEORGE PRINCE from federal inspection and manning requirements is that it was providing a free ferry service to the general public. Otherwise, such requirements would be applicable under 46 U.S.C. 404.⁶ There is no special

²414 f. Supp. 1105 (E.D. La. 1976).

³ 494 F. 2d 681 (9 Cir. 1974).

⁴Of course, Congress has the plenary power to regulate all pilotage with reference to such vessels under the interstate and foreign commerce clause of the Constitution (Art. 1, §8, cl. 3). However, state pilotage systems are recognized by the Congress in 46 U.S.C. 211 and 215, and by the Supreme Court since Cooley v. Port Wardens, 12 How.(U.S.) 299, 311, 13 L. Ed. 966 (1851).

⁵LSA-R.S. 34:941 et. seq.

⁶This statute provides for inspection of "every ferry boat...propelled by steam" and motor ferries above 15 gross tons and over 65 feet in length "carrying passengers for hire" and for their navigation by licensed officers. 46 U.S.C. 390-390g makes any vessel carrying more than six passengers which is under 15

exemption for state-owned vessels when "navigating any waters of the United States which are common highways of commerce or open to general competitive navigation ..."⁷

Petitioner's license was suspended under 46 U.S.C.239 and regulations of the Commandant, issued pursuant to subsection (j) thereof, "to secure the proper administration of" that statute. The Commandant's regulation in 46 CFR 5.01-30 provides in pertinent part that suspension and revocation proceedings authorized by 46 U.S.C. 239" shall be instituted... in any case in which it appears [after investigation under 46 CFR Part 4] that there are reasonable grounds to believe that the holder of a license ... issued by the Coast Guard... has committed an act of incompetence, misconduct, negligence, or unskillfulness while acting under authority of his license...." In 46 CFR 5.01.35, it is further provided that "a person employed in the service of a vessel is ... acting under authority of a license... either when ... required by law or regulation or ... as a condition of employment." Although the Soriano court rejected the Commandant's condition-of-employment regulation in the matter of pilotage governed by state law, we see no reason to apply the doctrine here. In our view, it is essential to safe navigation that the pilots of ferry vessels crossing the Mississippi River, a common artery of water commerce, should observe the rules and procedures established under federal law for these waters.⁸ This is best assured by federal licensing and, where it is required by the employing entity, public or private, we are disposed to regard the pilotage of free ferries as being within the purview of 46 U.S.C. 239. Petitioner has not shown that he was performing pilotage authorized and regulated exclusively by the state and recognized as such under federal law. Absent this showing, the Dietz and Soriano decisions are inapplicable and his jurisdictional contention fails.

The petitioner also asserts that the Commandant's motion to dismiss was never received by counsel for the petitioner. As indicated in our prior order, a certificate of service attests that a copy of the motion "was forwarded certified, Receipt Returnable..." to the counsel's law firm. Since the Coast Guard has not submitted the return receipt, we no longer assume that petitioner's counsel was properly served. However, this cannot

gross tons, fully subject to Coast Guard regulations.

⁷46 U.S.C. 362; see The Oyster Police Steamers of Maryland, 31 F. 763 (D.C. Md. 1887).

⁸Namely, the "Western Rivers" navigation rules, in 33 U.S.C. 301-356.

excuse his unexplained failure over a period in excess of 6 months to file and appeal brief in compliance with the Board's rules of procedure.⁹ Without regard to the motion of the Commandant, therefore, we find that Order No. EM-54 contains ample grounds for the dismissal of petitioner's appeal.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration of Order EM/054 be and it hereby is denied; and

2. Petitioner's further motions to dismiss and to expunge the record of proceedings suspending his license be and they are also hereby denied.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above order.

⁹Our rules provide that an "appellant must file... a brief in support of the appeal" within 20 days after the filing of a notice of appeal. 49 CFR 825.20(a). Although extensions of time are granted on a showing of good cause, none was requested.

¹⁰If an appeal is not perfected, it is subject to dismissal on the Board's own initiative. 49 CFR 852.20(e).